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January 12, 2000

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VIA HAND DELIVERY
Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals, TW-A325
445 12th Street, S.W.
Washington, DC 20554

Re: Comments of Local TV on Satellite, LLC
In the Matter of
Implementation of the Satellite Home
Viewer Improvement Act of 1999
Retransmission Consent Issues
(CS Docket No. 99-363)

Dear Ms. Salas:

Transmitted herewith, on behalf of Local TV on Satellite, LLC ("LTVS"), are an original and nine (9) copies of its Comments in the above-referenced proceeding. A diskette copy of LTVS's Comments is being simultaneously submitted under separate cover to Steven Broeckaert of the Cable Services Bureau and to the Commission's copy contractor, International Transcription Service.

An extra copy of the filing is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

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If you have any questions please contact the undersigned.

Very truly yours,

HOLLAND & KNIGHT LLP

Patricia Y. Lee
Counsel for Local TV on Satellite, LLC

Enclosure

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
Retransmission Consent Issues	)	

COMMENTS OF
LOCAL TV ON SATELLITE, LLC

LOCAL TV ON SATELLITE, LLC

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of:	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
Retransmission Consent Issues	)	

COMMENTS OF LOCAL TV ON SATELLITE, LLC

On December 22, 1999, the Federal Communications Commission ("Commission") released a Notice of Proposed Rulemaking ("Notice") seeking comments on the implementation of the Retransmission Consent provisions of the Satellite Home Viewer Improvement Act ("1999 SHVIA"), which was enacted on November 29, 1999. Local TV on Satellite, LLC ("LTVS"), by its counsel, hereby submits its comments in response to Section IV of the Notice.

I. INTRODUCTION.

1. LTVS was founded in 1997 by Capitol Broadcasting Co., Inc., its subsidiary, Microspace Communications Corporation, and certain other shareholders. LTVS was founded to develop a basic local television station satellite delivery service that will deliver via direct broadcast satellite ("DBS") systems all local television stations in a given market. LTVS has developed a business plan and the technology to distribute via satellite all over-the-air, full power, commercial and noncommercial television stations within a given station's Designated Market

Area ("DMA"). LTVS's intent is to deliver individual local station packages to all DBS providers, who will then retail these packages to their subscribers. LTVS will provide consumers with the convenience of receiving their DBS signals and local television signals with one dish/one box/one bill.

2. LTVS agrees with the Commission that the 1999 SHVIA is important legislation that will provide long-awaited benefits to consumers. Under the 1999 SHVIA, consumers who subscribe to DBS will now be able to receive local broadcast programming through their DBS provider. Consumers who were hesitant to consider DBS services because of the absence of local station signals can now make more and better choices in selecting a multichannel video programming distributor ("MVPD"). The legislation removes the primary competitive obstacle for DBS providers in competition with cable.

3. The passage of the 1999 SHVIA will enable LTVS to move forward with its plan for providing consumers with improved DBS service. LTVS urges the Commission to move swiftly to implement the statute so that consumers may begin to enjoy its full benefits.

4. In the Notice, the Commission seeks comments on the good faith negotiation requirement, the prohibition on exclusive retransmission contracts, and enforcement procedures. LTVS believes that the Commission should adopt the Uniform Commercial Code ("UCC") definition of "good faith" and adopt specific standards for determining what constitutes a good faith negotiation and what constitutes a "competitive marketplace consideration." The 1999 SHVIA provides

that the prohibition on exclusive retransmission contracts shall, at a minimum, be effective until January 1, 2006. However, the Commission should not restrict the rule to this bare minimum. Instead, it should extend the exclusivity prohibition indefinitely to ensure that consumers receive the benefits of the legislation permanently. Finally, LTVS believes that the Commission should adopt enforcement procedures similar to the type found in Section 76.7 of the Commission's rules and that the same enforcement procedures should apply to both the exclusivity prohibition and the good faith negotiation provisions of the 1999 SHVIA.

II. THE COMMISSION SHOULD ADOPT THE UCC DEFINITION OF THE TERM GOOD FAITH AND ADOPT A SPECIFIC STANDARD ON WHAT CONSTITUTES A GOOD FAITH NEGOTIATION.

5. The 1999 SHVIA requires the Commission to adopt regulations to impose on television broadcast stations a duty to negotiate retransmission consent agreements in good faith. 47 U.S.C. § 325(b). The regulations must provide, however, that a television broadcast station should be allowed to enter into retransmission consent agreements containing different terms and conditions, including price terms, with different MVPDs, if the differences in the agreements are based on competitive marketplace considerations, and that such differences do not constitute a *per se* failure to negotiate in good faith. This is consistent with the intent of the 1999 SHVIA to improve competition in the MVPD marketplace.

6. The term "good faith" should be defined explicitly in order to provide the parties with clear standards for the retransmission consent negotiation process.

The UCC defines "good faith" as "honesty in fact in the conduct of the transaction concerned." UCC § 1-201(19) (1981). This is a well understood definition of the term. Accordingly, the Commission should adopt this commercially-accepted definition of good faith.

7. In addition, LTVS agrees that the Commission should adopt a two-part objective-subjective test for good faith similar to that used by the National Labor Relations Board in the context of collective bargaining negotiations and by the Commission in the context of interconnection agreements. *See, e.g.*, 29 U.S.C. § 158(d) and 47 C.F.R. § 51.301, respectively. LTVS believes that a two-part test is necessary because it is impossible to try to identify now every possible action that might be inconsistent with the duty to negotiate in good faith.

8. With respect to the objective part of the test, LTVS recommends that the Commission adopt provisions similar to the following *per se* violations set forth in Section 51.301 of the Commission's rules:

> (1) Intentionally misleading or coercing another party into reaching an agreement it would not otherwise have made;
>
> (2) Intentionally obstructing or delaying negotiations or resolution of disputes;
>
> (3) Refusing throughout the negotiations process to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of issues; and
>
> (4) Refusing to provide information necessary to reach agreement.

47 C.F.R. § 51.301. The remaining *per se* violations in Section 51.301 are specific to incumbent local exchange carriers and would not apply to the good faith standard of the 1999 SHVIA.

9. As to the subjective test, LTVS recommends that the Commission utilize a reasonableness test that examines the "totality of the circumstances" evidencing a party's behavior during negotiations to determine whether the duty to negotiate in good faith has been violated.

10. Finally, the 1999 SHVIA permits television broadcast stations to negotiate in good faith retransmission consent agreements with different MVPDs that contain different terms and conditions, including price terms, provided that such different terms and conditions are based upon "competitive marketplace considerations." 47 U.S.C. § 325(b)(3)(C). In order to lend clarity to the retransmission negotiation process, the Commission should expressly define the term "competitive marketplace considerations." LTVS believes that normal business world events and legitimate cost justifications are the types of "competitive marketplace considerations" that would justify negotiating in good faith retransmission agreements with different MVPDs that contain different terms and conditions. LTVS would not oppose using the non-discrimination standards in the program access context as a basis upon which to develop a standard for "competitive marketplace considerations." *See* 47 C.F.R. § 76.1002(b)(2)-(3).

III. THE COMMISSION SHOULD EXTEND THE EXCLUSIVE CONTRACTS PROHIBITION INDEFINITELY.

11. Section 325(b) of the Communications Act directs the Commission to commence a rule making proceeding that shall:

> until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts . . . .

S. 1948, the Intellectual Property and Communications Omnibus Reform Act of 1999, Section 1009(a)(2)(C)(ii), p. 46.

12. Neither this provision, nor any other provision in the 1999 SHVIA, prohibits the Commission through its general powers from extending the exclusivity prohibition beyond January 1, 2006. *See* Title I, Communications Act of 1934, as amended. Congress did not intend for the prohibition to "sunset" after January 1, 2006, but merely specified a minimum time frame after which the Commission could determine whether extension of the prohibition would be in the public interest, and if so, whether changed market conditions would necessitate modification of the prohibition.

13. For purposes of statutory construction, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). The statutory language of Section 325(b) differs in significant respects from the language in various sunset provisions contained in the Communications Act. For example, compare the language in Section 325(b) with the language in Section 628(c) of the Communications Act. Section 325(b) requires that the exclusivity prohibition shall be effective "until" January 1, 2006. The January 1, 2006 date is simply a minimum effective time period. In contrast, Section 628(c), entitled "SUNSET PROVISION," expressly provides that the prohibition on cable

exclusive contracts "shall cease to be effective 10 years after the date of enactment of this section . . . ." 47 U.S.C. § 628(c)(5). The use of the term "cease" in Section 628(c) makes clear that the relevant provision is no longer in effect on the specified date.

14. Accordingly, Congress must not have intended for the exclusivity prohibition to cease to be effective on January 1, 2006. The Commission may and should extend the prohibition beyond the minimum period because the prohibition will continue to be necessary to foster competition and diversity in the MVPD market, which is precisely the intent of the 1999 SHVIA.

15. If the exclusivity prohibition is not extended beyond January 1, 2006, the DBS industry, in particular, and competition in the MVPD market in general, may never reach its full potential. Exclusive contracts in the DBS retransmission context would deter market entry and inhibit competition in the MVPD market, which is contrary to the very purpose of the 1999 SHVIA.

16. Exclusive contracts could result in distortions in the MVPD market. If exclusive contracts are permitted DBS providers may not be able to carry all of the local stations in a particular DMA, as intended by the 1999 SHVIA. Presumably, if a local station were to enter into an exclusive arrangement with one DBS provider then all other DBS providers would not be able to carry all local stations in that market. Consequently, consumers who subscribe to any of the "other" DBS providers would not receive all of their local stations from their DBS service. Taken a step further, imagine other stations in the market entering into similar exclusive

arrangements with other DBS providers. What would develop would be mutually exclusive pockets of DBS/local programming combinations and no single DBS service would carry all stations in a market. This is precisely the situation that the 1999 SHVIA was designed to address by enabling consumers to receive *all* of their local broadcast programming through their DBS provider.

17. These market conditions would likely discourage potential new entrants into the MVPD marketplace. The initial investment in satellites and local designated receive facilities involves hundreds of millions of dollars and satellites are expected to have a life of approximately fifteen years. It simply would make no rational business sense to make such a large investment in this uncertain environment. In addition, these market conditions would inhibit competition and diversity in the MVPD marketplace, particularly competition to traditional cable systems.

18. The 1999 SHVIA was designed to place satellite carriers on an equal footing with local cable operators in terms of the availability of broadcast programming. It would be perverse to implement the 1999 SHVIA in such a way that would harm the very industry the legislation was designed to promote. Accordingly, the Commission should extend the exclusivity prohibition indefinitely. The extension is necessary to ensure that the pro-competitive goals underlying the 1999 SHVIA are realized.

IV. BY SELECTING THE BROADER PHRASE "ENGAGING IN" CONGRESS INTENDED TO PROHIBIT THE FULL RANGE OF EXCLUSIVE CONTRACTING ACTIONS, NOT JUST THE ACT OF "ENTERING INTO" AN EXCLUSIVE RETRANSMISSION CONTRACT.

19. Pursuant to Section 325(b) of the Communications Act, until January 1, 2006 television broadcast stations that provide retransmission consent are prohibited from "*engaging in* exclusive contracts." 47 U.S.C. § 325(b) (emphasis added). In the Notice, the Commission seeks comment on what activities would constitute "engaging in" exclusive retransmission agreements. The Commission noted the distinction between the phrase "engaging in," which is used in the statute, and the phrase "entering into," which was used in the Conference Report, but ultimately rejected in favor of the phrase "engaging in." Joint Explanatory Statement of the Committee of Conference on the Intellectual Property and Communications Omnibus Reform Act of 1999, at 13.

20. LTVS agrees with the Commission that a distinction exists between the two phrases, and submits that Congress chose the broader phrase "engaging in" over the more narrow phrase "entering into," because it intended for the exclusivity prohibition to prohibit the full range of exclusive contractual activities, both before January 2006 and after that date. Alternatively, should the Commission decide not to extend the exclusivity prohibition, the Commission should nonetheless prohibit the full range of exclusive contractual activities until 2006.

21. According to Black's Law Dictionary, the verb "engage" means "to embark on." Black's Law Dictionary 528 (6^{th} ed. 1990). Thus, to "engage in" an activity indicates the commencement of an activity, such as preliminary discussions

or negotiations, and encompasses all activities leading up to and including the culmination of an event. By contrast, the verb "enter" means "to. . .come into a condition." *Id.* at 530. Used in this more general sense, the word "enter" indicates the culmination of an activity. As commonly used in the context of contracts, to "enter into" means to execute a contract. *See, e.g., Dyno Construction Co. v. McWane, Inc.*, No. 98-4050, 1999 U.S. App. LEXIS 32,833, at *16 (6th Cir. Dec. 20, 1999) (invitation to "engage in" future negotiations distinguished from offer to "enter into" a contract). Therefore, the term "engage in" is clearly much broader than the term "enter into," as the former encompasses all preliminary activities leading up to the execution of a contract, as well as the subsequent performance of the agreement, while the latter refers only to the contract's execution.

22. Here, Congress understood the implication of both terms, and chose the broader phrase "engaging in." Accordingly, until at least January 1, 2006, Congress sought to prohibit the full range of contracting actions with regard to exclusive contracts – from preliminary discussions through negotiations, execution of such contracts, and all acts necessary to performance of an exclusive contract. Such acts would include, but are not limited to, letters of intent, memoranda of understanding, or other forms of binding arrangements related to future exclusive contracts. For example, until at least January 1, 2006, a television station is to be prohibited from entering into a letter of intent or even negotiating a future exclusive contract that would take effect on or after January 1, 2006.

23. Therefore, in order to effectuate the intent of Congress, the Commission should prohibit the full range of exclusive contractual activities, and not simply the execution or performance of exclusive retransmission agreements.

V. THE COMMISSION SHOULD ENACT SPECIFIC ENFORCEMENT PROCEDURES.

24. The Commission also sought comment on the type of enforcement procedures it should employ in order to enforce the exclusivity prohibition and the good faith negotiation requirement. LTVS believes that the special relief procedures of the type found in Section 76.7 of the Commission's rules would provide an appropriate framework for addressing the issues arising under the exclusivity prohibition and good faith negotiation provisions of the 1999 SHVIA, and that the same enforcement procedures should apply to both provisions. As to the burden of proof, LTVS believes that the burden of proof should remain with the complaining party until it has made a *prima facie* showing. Upon making such a showing, the burden should then shift to the defending party.

VI. CONCLUSION.

25. For all these reasons, including in particular the intent and the pro-competitive goals underlying the 1999 SHVIA, the Commission should adopt the UCC definition of the term good faith, adopt a specific standard on what constitutes a good faith negotiation, adopt a specific standard on what constitutes "competitive marketplace considerations," extend the exclusive contracts prohibition indefinitely

beyond 2006, and enact specific enforcement procedures similar to those found in Section 76.7 of the Commission's rules.

Respectfully submitted,

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